Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

UNITED STATES ex rel., JOSEPH HAMPTON,

Petitioner,

v.

GEORGE DETELLA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an explicit waiver of the Constitutional right to closing argument as guaranteed by due process of law, the Sixth Amendment, and this Court's opinion in *Herring v. New York*, 422 U.S. 853 (1975), can be found based solely on a trial court's statement at a hearing at post-trial proceedings that Petitioner's attorney said at some other time after trial, and not on record, that Petitioner did not want closing argument, in direct conflict with this Court's opinion in *Johnson v. Zerbst*, 304 U.S. 458 (1938), that "an intentional relinquishment or abandonment of a known right" must be shown before waiver will be found.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joseph Hampton, respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to review that court's judgment and opinion entered on July 6, 2000 denying Petitioner's petition for writ of habeas corpus, and its order entered on August 8, 2000 denying Petitioner petition for rehearing with suggestion for rehearing *en banc*.

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit issued its opinion on July 6, 2000. *Hampton v. Detella*, No. 98-3897 (7th Cir. 2000). This decision is reprinted in the appendix to this petition. On August 8, 2000, that court denied Petitioner's petition for rehearing with suggestion for rehearing *en banc*. That order is also reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals entered its order denying Petitioner's petition for writ of habeas corpus on July 6, 2000. Petitioner filed a timely petition for rehearing with suggestion for rehearing *en banc* on July 20, 2000. That petition was denied by the court on August 8, 2000. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(c) since Petitioner seeks discretionary review of an order of the United States Court of Appeals for the Seventh Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution – Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [,] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner, along with a co-defendant, Jayme P. Sebers, was charged in the Circuit Court of Kendall County, with multiple counts of attempted murder, armed robbery, and aggravated battery. The two waived their rights to a jury trial and on August 20, 1991, pleaded guilty to the charges and were sentenced. They both filed motions to withdraw their guilty pleas and to vacate the convictions, which were denied. In separate appeals, the Illinois Appellate Court reversed the orders denying the motions to withdraw the guilty pleas and ordered that the defendants be allowed to enter new pleas. See *People v. Hampton*, 620 N.E.2d 3 (Ill. App.2d Dist. 1993).

On remand, both defendants pled not guilty and requested that the court allow them to reinstate their jury demands, which the court denied. The case proceeded to a bench trial and both were found guilty. Hampton was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count, for a total of 90 years impris-

onment, with a concurrent term of 10 years for aggravated battery.

Hampton appealed, raising the following issues: (1) he was denied his right to defend against the charges when the trial judge declared him guilty without affording him an opportunity to present closing argument; (2) the court erred when it denied him the opportunity to present closing argument; (3) the court erred in determining that his sentence for armed robbery must be served consecutive to his sentence of attempted murder; and (4) the court abused its discretion in sentencing him to consecutive extended-term sentences totaling 90 years imprisonment. On April 1, 1996, the Illinois Appellate Court denied Hampton's appeal. Hampton filed a timely leave to appeal to the Illinois Supreme Court which was denied on October 2, 1996. He then filed a petition for writ of certiorari to this Court, which was denied on March 31, 1997.

Co-defendant Sebers filed a separate appeal and on March 3, 1997, the appellate court reversed the trial court's denial of Sebers' request for a jury trial, and remanded the case to the pleading stage. On June 4, 1997, the Illinois Supreme Court denied the state's petition for leave to appeal the decision with regard to Sebers.

On November 12, 1997, Petitioner filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Illinois raising two claims: (1) he was denied due process of law and his Sixth Amendment right to counsel when the state court declared him guilty without allowing him to present a closing argument; and (2) he was denied his equal pro-

tection rights when the appellate court reversed Sebers' conviction on the basis that the trial court had erred in denying his request for a jury trial.

The district court denied Petitioner's habeas corpus petition, and on November 11, 1998 granted a certificate of appealability as to the first claim. The Court of Appeals for the Seventh Circuit agreed that Petitioner had not procedurally defaulted the claim and addressed it on the merits. The court then affirmed the denial of Petitioner's petition for writ of habeas corpus, finding that Petitioner waived his right to make closing argument based on the trial court's statement at a hearing on Petitioner's post-trial motion allegation that the court erred in failing to allow opening statements and closing arguments, that:

> "As to Paragraph 5, notwithstanding defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's statements to the Court before attorney Frank Brewe [counsel for Hampton's co-defendant] and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . . ."

The court found that that statement by the trial court was an explicit waiver of Petitioner's Constitutional right to present closing argument and denied Petitioner's habeas corpus petition. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc, and on August 8, 2000, the court denied the petition for rehearing with suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT INCORRECTLY FOUND THAT AN "INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT," SPECIFICALLY THAT OF THE CONSTITUTIONALLY GUARANTEED RIGHT TO CLOSING ARGUMENT, CAN BE SHOWN SOLELY ON THE BASIS OF THE TRIAL COURT'S STATEMENT AT THE HEARING ON THE PETITIONER'S POST-TRIAL PROCEEDINGS THAT PETITIONER'S COUNSEL SAID AT SOME UNSPECIFIED TIME AFTER THE TRIAL AND NOT ON THE RECORD, THAT PETITIONER'S COUNSEL DID NOT WANT CLOSING ARGUMENT WITHOUT ANY INQUIRY OF THE PETITIONER REGARDING HIS RIGHT TO PRESENT ARGUMENT.

The United States Court of Appeals for the Seventh Circuit in this case found that there was an adequate waiver of closing argument based solely on the trial court's, whose actions were being called into question, statement at the hearing on Petitioner's post-trial proceedings that at some time after trial, and not of record, Petitioner's counsel said that Petitioner did not want closing argument. The Court of Appeals also suggested the burden was on Petitioner to show counsel did not make such a statement. This is in direct conflict with this Court's expression that "an intentional relinquishment or abandonment of a known right must be shown before waiver will be found." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is also directly contradictory of this Court's reluctance to find waiver unless expressly made. In the face of such glaring dismissal of this Court's well-established rule of the law

applicable to waiver, this Court should reaffirm said rulings.[1]

In this case, following Petitioner's bench trial, the State trial court immediately declared Petitioner guilty after ruling on a motion, without affording counsel the opportunity to argue or request to argue or to present closing argument. The trial court never inquired of the Petitioner, Joseph Hampton, of his desire to have argument. The State appellate court found that Petitioner waived the issue by failing to request argument. The District Court in this case found that that was error, because a Petitioner cannot waive his right to present closing argument without a meaningful opportunity to request argument or object. However, the District Court, following supplemental arguments, found explicit waiver based on the following statement of the trial court at a post-trial proceeding:

> "As to Paragraph 5, notwithstanding defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's statements to the Court before attorney Frank Brewe [counsel for Hampton's co-defendant] and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . . ."

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[1] This Court should also grant certiorari since courts are finding waiver of this fundamental constitutional right based solely on silence. See *United States v. Davis*, 993 F.2d 62, 65 (5th Cir. 1993).

The United States Court of Appeals for the Seventh Circuit agreed and added that Petitioner had not shown that the trial court's unsworn statement that Petitioner's counsel relinquished his right to closing argument was not correct. This finding by the United States Court of Appeals directly contradicts prior holdings of this Court, and certiorari should be granted to correct this potentially far-reaching and devastating departure from this Court's rulings.

The right to present closing argument is clearly established. *Herring v. New York*, 422 U.S. 853 (1975). Because "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process," a judge cannot deny defense counsel an opportunity for closing argument. *Herring*, 422 U.S. at 857. It is per se reversible error for the court to deny a defendant in a criminal trial the right to present closing argument. *Herring*, 422 U.S. at 856-65.

However, the *Herring* Court endorsed the proposition that the right to present a summation may be waived by quoting with approval the statement of a Maryland Court of Appeals in a previous case:

> "The Constitutional Right of a defendant to be heard through counsel necessarily includes the right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument . . ." *Yopps v. State*, 178 A.2d 879, 881 (Md. 1962).

The standard to be applied in determining the question of wavier as a matter of Federal Constitutional law is that it is incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Further, this Court has held that courts should indulge in every reasonable presumption against waiver (*Brookhart v. Janis*, 384 U.S. 1 (1966)), and they should not presume acquiescence in the loss of fundamental rights. *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). Whether waiver occurs should appear of record. *Johnson v. Zerbst*, 304 U.S. at 463.

While on previous occasions the Seventh Circuit has employed the correct Constitutional standard (*United States v. Spears*, 671 F.2d 991 (7th Cir.), the court is apparently straying far afield from requiring a waiver to be shown on the record, or explicitly. While the Seventh Circuit said it would have been "better" if there had been an explicit waiver, it did not require it. Furthermore, the court then found that it was Petitioner's burden to prove that waiver did not occur. This directly conflicts with a presumption against waiver. *Brookhart v. Janis*, 384 U.S. at 16. Because the Seventh Circuit Court's opinion is so directly contradictory of many of this Court's teachings, this Court should grant certiorari to "right the wrong" and reestablish these basic but important principles of Constitutional law.

CONCLUSION

For the aforementioned reasons, Petitioner, Joseph Hampton, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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APPENDIX

App. 1

[Dated July 6, 2000]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3897

JOSEPH HAMPTON,

Petitioner-Appellant,

v.

GEORGE E. DETELLA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, No. 97 C 7885.
Honorable James B. Moran, Judge Presiding.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

OPINION: ORDER:

Petitioner, Joseph Hampton and his co-defendant Jayme P. Sebers, were charged in the Circuit Court of Kendall County with multiple counts of attempted murder, armed robbery, and aggravated battery. They initially waived their right to jury trials and pled guilty, but subsequently moved to withdraw their guilty pleas and to vacate the conviction. The trial court denied their motions, but the Illinois Appellate Court reversed. On remand, they pled not guilty and asked the court to reinstate their jury demands. The court

refused to do so, and conducted a bench trial. According to Hampton (and unrebutted by the State), at the close of the trial the court ruled on a motion and then immediately declared them guilty without affording defense counsel an opportunity to request or present closing arguments. Hampton was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count, for a total of 90 years with a concurrent prison term of 10 years for aggravated battery.

After exhausting his state court appeals, Hampton filed a petition for a writ of habeas corpus, asserting two claims: (1) that he was denied due process of law and his Sixth Amendment right to counsel when the state court pronounced him guilty without affording him an opportunity to present a closing argument; and (2) he was denied equal protection when the appellate court reversed his co-defendant's conviction on the ground that the trial court erred in denying the request for a jury trial. The district court denied his habeas petition, and Hampton appeals only the first claim. We agree with the district court that Hampton did not procedurally default the claim, and thus turn to the merits.

In Herring v. New York, 422 U.S. 853, 858, 45 L.Ed. 2d 593, 95 S.Ct. 2550 (1975), the Supreme Court recognized that the opportunity to make closing argument is a basic element of the adversary fact-finding process in a criminal trial. In fact, the Court held that "no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." Id. at 862. Accordingly, the Court held that it is per se re-

versible error for a trial judge to deny a defendant the opportunity to present a closing argument. Id. at 865. United States v. Spears, 671 F.2d 991, 992 (7th Cir. 1982). That right to present closing argument, however, may be waived. Id., citing Herring, 422 U.S. at 860. This appeal hinges upon the narrow issue of whether the defendant waived his right to closing arguments.

We will find waiver only if the record demonstrates "'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 993, quoting Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). The district court found such an intentional relinquishment on this record, and we agree. First, defense counsel never requested closing argument. This alone is not dispositive, because there was little time for reflections between the close of evidence and the finding of guilt. Nevertheless, the record indicates that the prosecutor interrupted the judge to inform the judge he had made a legal error in discussing the mental state required for an attempted murder conviction. That indicates an atmosphere in which a defense counsel could be expected to interrupt to raise something as important as the denial of closing argument. We would not, however, find waiver on that alone. But there is more. In paragraph 5 of a post trial motion, Hampton argued that the court erred in failing to allow opening statements and closing arguments. At a hearing on the motion, the trial court stated:

> As to Paragraph 5, notwithstanding defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's state-

> ments to the Court before attorney Frank Brewe [counsel for Hampton's co-defendant] and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . . .

That statement of fact by the trial court reveals an explicit waiver of closing argument by Hampton's defense counsel. Hampton provides no evidence casting doubt on the veracity of the court's statement. Instead, Hampton argues that the statement cannot support a finding of waiver because it was an unsworn statement made by the trial judge faced with an argument of trial error and appears to relate a statement by defense counsel that was made after the error occurred. We agree that the better practice would be to obtain the statement from counsel on the record. Nevertheless, we think that the statement could properly be considered by the trial court in determining whether Hampton waived closing arguments. Where a defense counsel does not request closing arguments but remains silent as the judge proceeds to enter a finding of guilt, the task for the court is to interpret that silence. The court must determine whether the silence constituted an acquiescence in proceeding without closing argument and thus an intentional relinquishment of it, or whether the defense counsel's silence reflected merely a lack of opportunity to timely object or an ignorance of the right to closing arguments. We have previously rejected efforts to constrict that interpretation through per se rules. In Spears, we refused to follow courts that considered silence, absent prejudice, to constitute a waiver, but we also declined to adopt the rules by other court's that closing arguments could never be waived by mere

silence. 671 F.2d at 994-95. Instead, we adopted an approach that considers all of the surrounding circumstances in making that determination. Here, the post-trial statement by defense counsel clarified to the trial court that the silence was intentional, and that Hampton's counsel "had no intention to ever make closing arguments." Although the trial judge identified three other parties to that conversation, Hampton has produced no evidence from any of them rebutting the trial court's recitation. Given the defense counsel's explicit acknowledgment that his silence reflected his intention to forego closing arguments, the trial court did not err in finding waiver. Accordingly, the decision of the district court is affirmed.

App. 6

[Dated August 8, 2000]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3897

JOSEPH HAMPTON,

Petitioner-Appellant,

v.

GEORGE E. DETELLA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, No. 97 C 7885.
Honorable James B. Moran, Judge Presiding.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

OPINION: ORDER:

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by petitioner-appellant on July 20, 2000, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is hereby DENIED.

Supreme Court, U.S.
FILED

001400 NOV 6 2000

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No.

In the
Supreme Court of the United States

UNITED STATES ex rel., JOSEPH HAMPTON,

Petitioner,

v.

GEORGE DETELLA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX I TO PETITION FOR WRIT OF CERTIORARI

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DECEMBER 8, 1994

* * * * *

[7]* initially filed. Thirdly, which is lastly and most importantly, the defendant did not present any evidence that his jury waiver was not knowingly and intelligently made or that the defendant was unaware of the consequences of the jury waiver as required by the law.

I specifically draw counsel's attention to the case of People versus Wesley found a 30 Ill. 2d 131 at page 133.

As to Paragraph 4, not having been present when defendant's attorneys raised the issue of substitution of judges, not only once but twice before two other judges, I can only assume that this issue was raised at those hearings. This issue was certainly never raised before this Court and because it is absolutely false and untrue, it must be denied.

As to Paragraph 5, notwithstanding defense counsel's failure to ask for an opening statement, or defense counsel's failure to request a closing statement or objecting to the Court at any time during the proceedings for admitting same at any time and further notwithstanding defense counsel's statements to the Court before attorney Frank Brewe and the Court Administrative Assistant, that they had no intention [R-1203] [8] to ever make closing arguments nor were they even going to raise that

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* Bracketed numbers refer to original report of proceedings and record page numbers.

as an issue in this case, the law is well settled that oral arguments in criminal cases tried before a Court as distinguished from a trial by a jury, is a matter of discretion and that the Illinois Supreme Court has held that a refusal of the Court, Trial Court, to hear oral arguments is not an abuse of discretion nor prejudicial to a defendant, especially where the proof of guilt is overwhelming and clearly established beyond a reasonable doubt as it was in the instant case.

Again, I call your attention to the case of People versus Wesley found at 30 Ill. 2d 131 at pages 134 and 135. Therefore this issue must also be denied.

As for Paragraph 6, I will quote from Hunter's. "The Illinois Supreme Court has adopted Federal Rule of Evidence 703 and 705 for cases filed on or after February 3, 1981, and for trials commenced on or after September 1, 1981, Wilson v Clark at 84 Ill. 2d 186, and Federal Rule of Evidence 703 provides: 'The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him at or before the hearing. [R-1204] [9] If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.' Federal Rules of Evidence 705 provides: 'The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may in any event be required to disclose underlying facts or data on cross-examination.' It is not necessary for hospital records to be admitted in order to elicit an expert medical opinion. Due to the high degree of reliability of hospital records,

an expert may give his response to a hypothetical question based on facts based on hospital records even though they are not in evidence." Again I cite the case of Wilson v Clark, 84 Ill. 2d 186 and accordingly Paragraph 6 must be denied.

Paragraph Number 7 is simply a restatement of Paragraph Number 1 except stating it in a different way. For the reasons I have given regarding Paragraph 1, paragraph 7 is also denied.

As to Paragraph 8, I'm not sure I understand the allegations of Paragraph Number 8. If [R-1205] [10] counsel is referring to the Court's making sure which charges we were proceeding with and the maximum sentences applicable thereto at the commencement of the trial, that clearly was not an arraignment. If counsel is referring to the Court's attempt to make the record clear by having counsel formally move to withdraw defendant's guilty plea, something counsel had never done prior to the mandate up to the date of trial which is what the basis for the whole mandate, the reversal of the Trial Court in the first place, that, too, is clearly not an arraignment. In either event, Paragraph 8 has to be denied.

Number 9, hearsay statements the Court admitted were pursuant to the state of mind exception which is a recognized exception to the hearsay rule. The statements were offered and admitted not for the truth of the matter or matters asserted but as demonstrating what induced the officers to act as they did. Thus, as stated by the Appellate Court in People versus Frye, 113 Ill. App. 3d 853, which cites McCormick on Evidence, Sections 246 and 249 in the second edition, 1972. Quote: "Thus, they

cannot be characterized as hearsay." Therefore, Paragraph 9 must also be denied. [R-1206]

[11] As to Paragraph Number 10, there was no testimony offered by either the defendants Hampton or Sebers as to the other as neither defendant elected to testify. If this is not what defendant is referring to in his motion, then this is also simply a re-characterization of Paragraph 1 and, again, the Court who heard both bench trials never considered any evidence related to one defendant as evidence against the other defendant in reaching the Court's decision in these cases. The facts as to each defendant stand on their own. Accordingly, Paragraph 10 must also be denied.

As to Paragraph 11, there was no evidence that the officer had done anything as to which he had ever done was his testimony. No evidence being presented to the contrary nor an offer of proof requested as to some knowledge of evidence which the Court was unaware of, this seemed to be a collateral matter. In accordance with the law the matter was not allowed to go in to what the officers did or didn't do in other cases, therefore, accordingly, Paragraph 11 should be denied.

As to paragraph 12, I'm not sure what quote, "dollar bill" unquote, defendant is referring [R-1207] [12] to in this paragraph but I believe and I think that the exhibits referred to as I'm not sure but from my notes, make reference to a one hundred dollar bill found in the defendants house, being a one hundred dollar bill, being referred to in defendant Hampton's confession, the second one being a tennis shoe worn by the victim, Michael Lichter, which his wife identified as being one worn by the victim when he left the residence immediately prior

to the crime. The law is well-settled that if evidence is logically relevant, that is, that it has some tendency to prove or disprove a matter in issue, it does not become inadmissible merely because it is incomplete, weak or remote unless it is too remote. In this case it is clearly not too remote as to either one. Accordingly—29 AM JUR 2d Evidence Section 253—not being too remote would be admissible, Paragraph 12 is denied.

As to 13, this paragraph is not only again a re-characterization of Paragraphs 1, 7 and 10, but it is also a conclusion not supported by any evidence whatsoever, and is totally contrary to the truth. The evidence relied upon as to defendants Hampton—as to defendant Hampton's guilt was defendant Hampton's confession, therefore, Paragraph 13 must be denied. [R-1208]

[13] Paragraph 14 must also be denied because it is not in accordance with the law. The Illinois Supreme Court has held in People versus Slaughter, 29 Ill. 2d 384 page 389: When the defendant moves for a directed verdict at the close of the People's evidence, and said motion is denied, and the defendant thereafter introduces evidence on his behalf after the motion is denied, the defendant is deemed to have waived his motion and thus, this contention cannot be and is not available to a defendant on review.

Paragraph 15, the issue raised by, excuse me, Paragraph 15, this issue was raised by Paragraph 15 was brought to the Court's attention—first brought to the Court's attention by Mr. Brewe who supplied the Court with both an informative diagram and case law as well. As previously—or I should say as found in both this case and in Mr. Sebers case, the order of, I believe it's October

27th must be amended to show that the defendant Hampton was guilty of armed robbery and two charges of attempt murder, specifically, the Court finds that aggravated battery is a lesser included offense of the attempt murder charge, therefore, this paragraph is granted to the extent that the order of October 27, 1994 is to be [R-1209]

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OCTOBER 27, 1994

* * * * *

[514]* MR. BLOOM: We rest on the motion. We are ready to do the offer of proof right now.

MS. FLETCHER: You are resting completely?

MR. BLOOM: Resting on the motion and resting on the defense case in chief.

THE COURT: State have any rebuttal witnesses they wish to call?

MS. FLETCHER: To that, no, sir, but I would ask the record to reflect that the defense have presented no evidence as to their affirmative defenses of compulsion or voluntary intoxication. I ask that the Court rules that the burden never shifted to us on those affirmative defenses.

THE COURT: Let me wait until after they have had their offer of proof. As far as the evidentiary statement is concerned, there is no more evidence; is that correct?

MR. CAMIC: Correct, when we make the offer of proof, we need to make a record with the defendants regarding—make a record with the defendant as Your Honor is aware, whether or not we put on a defense is

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* Bracketed numbers refer to original report of proceedings and record page numbers.

one of the decisions that must be made by the defendant not by counsel. We—

THE COURT: You want that on the record? [R-1147]

[515] MS. FLETCHER: What?

THE COURT: The offer of proof.

MR. CAMIC: I said, in addition to the offer of proof, you have to make a record with the defendant.

THE COURT: If you wish to do that you can do that now. The offer of proof, I'll let you do by yourself.

MR. CAMIC: That's fine.

Mr. Hampton, you had a chance to talk with Mr. Bloom and myself—

THE COURT: Mr. Hampton, you understand you are still sworn as far as the admonitions and as far as this trial you are still sworn; do you understand?

MR. HAMPTON: Yes.

THE COURT: Have Mr. Hampton step up.

MR. CAMIC: Mr. Hampton, you and I had a conversation as well as Mr. Bloom, and you had a conversation regarding whether or not you wanted to put on a defense, right?

MR. HAMPTON: Yes.

MR. CAMIC: We told you it was your decision to make, right?

MR. HAMPTON: Yes.

MR. CAMIC: You said you didn't want to put on a [R-1148] [516] defense?

MR. HAMPTON: That's correct.

MR. CAMIC: We have also had a conversation with you whether or not you wanted to testify; is that correct?

MR. HAMPTON: Yes.

MR. CAMIC: And we told you it was your decision whether or not to testify?

MR. HAMPTON: Correct.

MR. CAMIC: And you decided not testify, right?

MR. HAMPTON: Yes.

MR. CAMIC: It's your decision?

MR. HAMPTON: Yes.

MR. CAMIC: Thank you, Judge.

THE COURT: Thank you. Now, as far as Mr. Hampton's case then, it's closed other than the offer of proof; is that correct?

MR. CAMIC: Yes, sir.

THE COURT: Now, we'll move to Mr. Brewe.

MR. BREWE: Defendant Sebers rests.

THE COURT: Do you wish to put on the record as well as to whether or not your client had consulted with you and voluntarily decided not to testify in these proceedings? [R-1149]

[517] MR. BREWE: We don't need to do that, Judge.

MS. FLETCHER: Are you going to rule on the exhibit?

THE COURT: I will go ahead, let Mr. Camic put in his offer of proof. If you'll send the bailiff to come get me

after he's made his offer of proof. As the trier of facts I shouldn't hear the offer of proof. If you'll get me after they made their offer of proof.

(Whereupon the Judge left the courtroom and the following proceedings were had in open court.)

MR. CAMIC: The evidence the defendant sought to admit was a report from Illinois State Water Survey, Wayne M. Wendland, State Climatologist, 1304 West Springfield Avenue, Urbana, Illinois, 61801, Unversity of Illinois, Urbana indicating that the Aurora College as the reporting station for 1990. On August 23, there was no precipitation, the high was 81 degrees, the low 61 degrees, the mean was 71, and no snow fall. On August 24, 1990, there was no precipitation, high 83, low 63, mean 73, no snow fall. On August 25, 1990, there was no precipitation, 84 [R-1150] [518] degrees was the high, 65 low, 75 the mean, no snow. On August 26, 1990, there was no precipitation, high was 87 degrees, low was 66, mean was 77, no snow fall, and on August 27, 1990, there was no precipitation, high was 93, low was 76, mean was 85, no snow fall.

We got to put it all in.

MR. BLOOM: You can get His Honor.

(Whereupon the Court reentered the courtroom and the following proceedings were continued in open court.)

THE COURT: I apologize, I get too many phone calls.

Okay, for the record then, we'll start first with the motion to suppress the confession which was filed pursuant to Section 5-114-11, Chapter 725, and the burden of going forward with the evidence and the burden of proving that a confession was voluntary should be on the State.

The Court having heard the testimony of the witnesses, having observed their demeanor while testifying and having considered the case law and the fact that all evidence that is not either impeached or [R-1151] [519] that there is no evidence to the contrary, must accept that evidence as being true, the Court finds that the State did for all the above reasons that the confession as to Mr. Hampton was voluntarily made and therefore the Motion to Suppress the confession would be denied.

As to the motion to suppress the evidence illegally seized, I'm not sure where I guess the evidence was illegally seized. The 4th Amendment protects a person and their personal property, effects, etc., I don't remember the exact words, homes. The automobile on the side of the roadway was not even subject to a reasonable expectation of privacy which within that category of four areas which the one that it is in open view, the officer was not on his way to Mr. Hampton's house to arrest him and everything that occurred there I find was voluntarily done as I previously indicated so the motion to suppress the evidence will also be denied. In which case I would therefore then admit State's Exhibit 39 over the objection of those motions being denied. As for—

MS. FLETCHER: We also have a written statement which has not gone in yet. [R-1152]

[520] THE COURT: You have what?

MS. FLETCHER: Mr. Hampton's written statement has not gone in because you reserved ruling.

THE COURT: What number was that?

MS. FLETCHER: I don't know, 57-A or B. The waiver went in. I just have to find the original statement. I have a copy.

MR. BLOOM: That's fine.

MS. FLETCHER: Judge, we will admit a copy. They have seen the original. I do think I have it somewhere.

THE COURT: 57 is what?

MS. FLETCHER: 57 is the statement of Hampton, 57-B, search waiver. 57-B we didn't offer. This was the search waiver for the house. They obtained a search warrant. We had testimony but we didn't offer—I'd be offering 57-A.

THE COURT: Okay, that was the one that was reserved; is that right?

MS. FLETCHER: Just Miranda warning and statement. Search waiver to the house and garage was not entered as they pertain to the search warrant.

Excuse me, I think that's it.

MR. CAMIC: For the record, show our objection so [R-1153] [521] we can be consistent.

THE COURT: To which, 57?

MR. CAMIC: The confession.

MS. FLETCHER: 57, straight 57.

MR. BLOOM: But in addition to the other objection we made with respect to the motion we had, we also have a chain of custody objection to that as well because Your Honor recalls Bergeron's testimony that he left at least one of the pages of that written statement on a kitchen table in the Sheriff's Office while they left for Court for a long period of time so we think there might be a chain of custody problem with respect to that statement.

MS. FLETCHER: There is no evidence.

THE COURT: There is no evidence to the contrary in terms of it being finished so there is no evidence to the contrary. I recognize your exception but I will over rule it.

Case Number 90 CF 97, Amended Bill of Indictment charges the defendant Jayme P. Sebers with the offense of attempt murder. A person commits the offense of attempt murder when he with the intent to kill or to do great bodily harm to an individual or knows that such acts would cause the death of an [R-1154] [522] individual or knows that such acts create a strong probability of death or great bodily harm to that individual or another.

MS. FLETCHER: Judge, under the attempt murder you have to prove a specific intent to kill. You can't—we can't go under the section that creates a strong probability of death.

THE COURT: From the evidence presented I was going to make that finding, defining the offense including it but—

MS. FLETCHER: We had to redo the indictments. That's the only reason I know that.

THE COURT: I understand killing on attempt need not have been accomplished to justify that offense but the evidence the Court finds was the State has met its burden beyond a reasonable doubt, the Court having considered the testimony of the witnesses and those presented in the evidence, nothing to the contrary, and as to the conduct at the time of the occurrence as to that same offense as to the People versus Jo Hampton, the Court makes the same finding that the State has proved beyond a reasonable doubt that the defendant did commit that offense based upon the evidence presented, specifically with the operation of [R-1155] [523] the motor vehicle and the striking with the intent to kill Michael Lichter with the bludgeon as well as the evidence in regards they did not want any witnesses, and all that being unrebutted.

As to the cases of 91 CF 21, and 91 CF—excuse me, 91-CF-21 and 91-CF-20 as to the attempt murder charges as to the eleven-year-old girl, Lauren Lichter, the Court will also make a finding that the State has established from the evidence presented during the course of the trial that the defendants committed said offenses, and the State met it's burden beyond a reasonable doubt and that these offenses were—I'll wait for that one. As to the offense of 90 CF 96 as to People versus Jayme Sebers and 90 CF 92, as for the offenses of armed robbery, under the accountability statute, a person is legally responsible for the conduct of another when either before or during the commission of an offense ans with the intent to promote, facilitate the commission of an offense he knowingly solicits, aids, abets, agrees to aid or attempts to aid the other person in the planning or commission of that of-

fense, the Court finds that such was the conduct between the defendants as to both the victim Michael Lichter and beating him [R-1156] [524] with the bludgeon for the purposes of taking money from him and striking him with the automobile and the State met the burden from the evidence presented during the trial beyond a reasonable doubt.

As to the cases of 90 CF 91 and 90 CF 95—90 CF 95, People versus Jayme Sebers and 90 CF 91 as to People versus Joseph Hampton for the offense of aggravated battery, that a person commits the offense of aggravated battery when he intentionally or knowingly or without legal justification by any means causes great bodily harm or permanent disability or permanent disfigurement to another person. The evidence established again with the accountability that the individuals who either before or during the commission of the offense with intent to promote or facilitate the commission of an offense, knowingly solicits, aids, abets or agrees or attempts to aid the other person in the planning or commission of an offense, I feel that the evidence was sufficient to establish beyond a reasonable doubt that Mr. Sebers and Mr. Hampton did this in this case, and, therefore, the Court makes a finding of guilty as to that charge as well.

The Court having made a finding of guilty [R-1157] [525] as to each of those charges then, hereby orders that the defendants be held in the Kendall County Jail pending a sentencing hearing pursuant to the statute and that a presentence investigation either be updated or a new one conducted.

Continue that matter for approximately thirty days for the sentencing hearing; that the report be submitted

to the Court not less than three days before the sentencing hearing.

MS. FLETCHER: Your Honor, on behalf of the State I would like to ask leave of Court to photocopy the currency that is admitted as a one hundred dollar bill and one hundred and twelve dollars of cash and place that in evidence and return the money to the victim's family. I don't think it has any probative value once it's been admitted and photographed and or copies of the money is sufficient to make the record complete.

THE COURT: Do you have any objection?

MR. BLOOM: We don't have any objection, that's fine.

MR. BREWE: No objection.

THE COURT: Based on that then, do it with defense counsel together so you all get copies of it.

MS. FLETCHER: Sure. [R-1158]

[526] THE COURT: You may submit them. Do you have a date specifically in mind looking at your respective schedules?

MS. FLETCHER: Did you want to do this on a regular criminal day or set it special?

THE COURT: November 29th at 1:30?

MS. FLETCHER: I know November 29th has got a lot of stuff on it. I'm asking whether you want to do it on Wednesday maybe if I could I get you a calendar, see if there is another day that's free. I know the 29th is busy.

MR. CAMIC: I couldn't be here the 29th.

MS. FLETCHER: December 6th, December 1st.

MR. CAMIC: I got a hearing in the morning and afternoon.

MR. BREWE: Fine with me, Judge.

THE COURT: We'll set it for Mr. Sebers then for December 1st at 1:30, and then—

MS. FLETCHER: Mr. Hampton on the 8th maybe. December 8th, is that any better for you ?

MR. CAMIC: Sure.

MS. FLETCHER: December 8th in the afternoon.

THE COURT: I will set it for December 8th at 1:30 unless my schedule complicates that, then I may [R-1159] [527] have to change the date on that.

MS. FLETCHER: Certainly, Your Honor. Even though, Judge, both defendants have not made bail, I presume the bond is revoked.

THE COURT: Bond is revoked, they're to be held in the Kendall County Jail pending sentencing.

MS. FLETCHER: Judge, would it be acceptable—are you going to be here for awhile? I want to write up the orders. I want to make sure I get the numbers correct.

THE COURT: Yes, I will be here.

(Which were all the proceedings had in the above-entitled cause on said date). [R-1160]

[Dated January 4, 1995]

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)		
Plaintiff,	)	Gen. Nos.	90 CF 91
-vs-	)		90 CF 92
	)		90 CF 93
	)		91 CF 20
JOSEPH HAMPTON,	)		
Defendant.	)		

ORDER

This cause having come upon for hearing on the defendant's Post Trial Motion for New Trial, and Motion in Arrest of Judgment, the Court having carefully reviewed the 20 paragraphs of said Motion and for the reasons stated of record, the Court specifically denying paragraphs 1 through 14 and 16 through 20, but granting paragraph 15, to the extent the Order of October 27, 1994, shall be amended in that defendant's conviction for Aggravated Battery (90 CF 91, Count II) is a lesser included offense (See e.g. *People v Bland* (1992) 228 Ill App

3d 1080) to the defendant's convictions for Attempt Murder (90 CF 93 and 91 CF 20), and the Court further finding the defendant's conviction for Armed Robbery (90 CF 92, Count I) must also be vacated pursuant to the "one act/one crime rule" (See e.g. *People v Nunez*, (1994), 263 Ill App 3d 740), and the Court being otherwise fully advised:

IT IS HEREBY ORDERED that defendant's conviction on October 27, 1994, for the offense of Aggravated Battery in 90 CF 91, Count II, shall be and hereby is vacated, said offense being a lesser included offense of the defendant's convictions for Attempt Murder, 90 CF 93 and 91 CF 20.

IT IS FURTHER HEREBY ORDERED that the defendant's conviction on October 27, 1994, for the offense of Armed Robbery, 90 CF 92, Count I, shall be and hereby is vacated, said offense constituting the same act/same crime as defendant's conviction for Armed Robbery in 90 CF 92.

IT IS FURTHER HEREBY ORDERED that defendant's Motion for a New Trial and Motion In Arrest of Judgment as to defendant's convictions on October 27, 1994, for the offenses of Attempt Murder in 90 CF 93 and 91 CF 20, for the offense of Armed Robbery in 90 CF 92 (Count I), and for the offense of Aggravated Battery in 90 CF 91, shall be and hereby is denied.

IT IS FURTHER HEREBY ORDERED that the cases of Attempt Murder (90 CF 93 and 91 CF 20), Armed Robbery (90 CF 92, Count I), and Aggravated Battery (90 CF 91) shall be and hereby are continued to January 5, 1995 at 1:30 p.m. for sentencing.

DATED: This 4th day of January, 1995.

ENTER: /s/_____
JUDGE

[Filed July 3, 1996]

THIS ORDER IS NOT PRECEDENTIAL
AND IS NOT TO BE CITED

2-95-0123

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County,
Plaintiff-Appellee,	)	
	)	No.: 90 CF 91
v.	)	90 CF 92
	)	90 CF 93
JOSEPH W. HAMPTON,	)	91 CF 20
	)	Honorable James L.
Defendant-Appellant.	)	Wilson, Judge Presiding.

MODIFIED RULE 23 ORDER ON DENIAL
OF PETITION FOR REHEARING

On August 20, 1991, Joseph W. Hampton (defendant), along with Jayme P. Sebers, pleaded guilty to two counts of attempted murder, two counts of armed robbery, and two counts of aggravated battery. Defendant's motion to withdraw guilty pleas and to vacate judgments of convictions and defendant's motion to reconsider sentence were denied. Defendant appealed. On September 2, 1993, this court reversed, finding the trial court failed to properly admonish defendant pursuant to Supreme Court Rule 402.

On October 27, 1994, after a bench trial, the trial court found defendant guilty of two counts of attempted murder, two counts of aggravated battery, and armed robbery. Defendant was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count for a total of 90 years' imprisonment with a concurrent term of 10 years' imprisonment for aggravated battery. Defendant appeals.

On appeal, defendant argues: (1) he was denied his right to defend against the charges against him when the trial judge declared him guilty without affording him an opportunity to present closing argument; (2) the trial court erred when it (a) denied him the opportunity to impeach a State's witness for purposes of his motion to quash arrest and suppress evidence, (b) admitted irrelevant and incompetent evidence, and (c) determined that defendant's sentence for armed robbery must be served consecutively to his sentences for attempted murder; and (4) the trial court abused its discretion in sentencing him to consecutive extended term sentences totaling 90 years' imprisonment where the court failed to consider mitigating factors. We disagree and we affirm.

First, defendant argues that he was denied his right to defend against the charges against him when the trial judge declared him guilty without affording him an opportunity to present closing argument.

"The right to present closing argument at trial is of constitutional magnitude, regardless of whether the trial is before a judge or jury or whether the defendant is represented by counsel of represent himself." *People v. Smith,* 249 Ill. App. 3d 460, 465 (1993), citing *Herring v. New York,* 422 U.S. 853, 45 L. Ed. 2d 593, 95 S. Ct. 2550

(1975). Therefore, where the trial court improperly curtails "defense counsel's closing argument, thereby denying him the full benefit of his constitutional right to effective assistance of counsel," reversal is compelled. *People v. Smith,* 205 Ill. App. 3d 153, 156 (1990). Nevertheless, "[t]he right to closing argument can be waived." *People v. Riley,* 219 Ill. App. 3d 482, 494 (1991).

We determine that the trial court did not improperly curtail defense counsel's closing argument. Defendant counsel made no attempt, at trial, to seek closing argument. Defense counsel did not object at the time the trial court began to make findings nor did he request to make closing arguments. Although defendant did raise the issue in his post-trial motion, it cannot be said that defense counsel was denied the opportunity to make closing argument. See *People v. Coleman,* 212 Ill. App. 3d 997, 1004 (1991). Because we do not believe that *Herring* stands for the proposition that the right to present closing argument is unwaivable, we hold that defense counsel waived the right to closing argument.

Next, defendant argues that the trial court erred in denying him the opportunity to impeach a State's witness for purposes of his motion to quash arrest and suppress evidence. Specifically, defendant contends that it was error for the trial court to not allow into evidence a University of Illinois State Water Survey (Survey) attempting to impeach Officer Tichava's (Tichava) testimony that it "started to rain" or "started to sprinkle" on the date in question.

It is well established that

> "where a witness' credibility is crucial, the trial court should permit the parties wide latitude in impeach-

> ing and rehabilitating the witness' credibility so that the jury can gain access to all necessary information and impressions in order to evaluate credibility. [Citation.] Matters of impeachment are within the trial court's sound discretion, and reviewing court should not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant." *People v. Morando,* 169 Ill. App. 3d 716, 730 (1988).

It has recently been stated that "a defendant has the right to question a prosecution witness regarding any matter which goes to explain, modify, or discredit the witness' testimony ***." *People v. Harris,* 262 Ill. App. 3d 35, 45 (1994).

However, "[t]he purpose of impeaching evidence is to destroy the credibility of a witness, not to establish the truth of the impeaching evidence." *People v. Redd,* 135 Ill. 2d 252, 316-17 (1990). "The exclusion of evidence is neither prejudicial nor grounds for reversal where the same or substantially the same evidence is admitted at some stage of the trial." *People v. Campbell,* 126 Ill. App. 3d 1028, 1052 (1984).

We determine that the trial court did not err when it denied defendant the opportunity to impeach Tichava for purposes of defendant's motion to quash arrest and suppress evidence. First, it is arguable that the proposed evidence is irrelevant. The proposed evidence declared that there was no precipitation on the date in question at the reporting station at Aurora College. However, defendant was attempting to prove that it did not rain at his home in Boulder Hill, Illinois. Furthermore, it can be argued that the issue of whether it was raining on the

date in question is a collateral matter and may not be impeached. See *People v. Breton*, 237 Ill. App. 3d 355, 364 (1992).

Second, any error that may have resulted from the exclusion of the Survey from evidence must be viewed as harmless. Testimony which was substantially similar to the Survey was admitted at trial. Specifically, Officer Harris testified that on the date in question the weather was "clear." Defendant's mother testified that on the date in question, the weather was "pleasant." The Survey can only be viewed as cumulative evidence and its admission would not have changed the result of the motion to quash arrest and suppress evidence. We conclude that the exclusion of the Survey from evidence was neither prejudicial to defendant nor dose it constitute grounds for reversal. See *Campbell*, 126 Ill. App. 3d at 1052.

Defendant also argues that the trial court erred by admitting irrelevant and incompetent evidence.

> "Real evidence is admissible when an adequate foundation is laid to establish that the item is the one involved in the alleged offense and is substantially unchanged since its seizure by authorities. [Citation.] When the evidence is not readily identifiable or is susceptible to alteration, the State must show a chain of custody of sufficient completeness to render it improbable that the item has been tampered, exchanged, or contaminated." *People v. Slaughter*, 149 Ill. App. 3d 183, 186 (1986).

However, "[w]hen the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would

produce no different result, the conviction may be affirmed." *People v. Arman,* 131 Ill. 2d 115, 124 (1989).

After reviewing the record, we find it unnecessary to determine whether the trial court improperly admitted the following into evidence: (1) testimony regarding Officer Harris' search for a one hundred dollar bill at defendant's home; and (2) testimony regarding the gym shoe found at the scene. This is true because we determine that even without the admission of the alleged improper evidence, overwhelming evidence exists that proves defendant's guilt beyond a reasonable doubt. In other words, even if the trial court improperly admitted the evidence, we determine that "retrial without the erroneous admission of the challenged evidence would produce no different result." *Arman,* 131 Ill. 2d at 124. Therefore, we may affirm defendant's conviction. See *Arman*, 131 Ill. 2d at 124.

Defendant further argues that the trial court erred when it determined that his sentence for armed robbery must be served consecutively to his sentences for attempted murder. The relevant statute states:

> "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, ***, in which event the court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4(a) (West 1994).

"In determining whether the defendant's actions constituted a single course of conduct, courts will often examine the motivations behind those actions." *People v.*

Morris, 237 Ill. App. 3d 140, 146 (1992). "Thus, in imposing consecutive sentences, the court in *Stokes* [*People v. Stokes*, 172 Ill. App. 3d 534, 537 (1988)] examined the record for the existence of separate and distinct acts and then sought to determine whether separate motivations existed behind those acts." *Morris*, 237 Ill. App. 3d at 146. Nevertheless, "[n]ot all crimes involving multiple acts are deemed to be the result of independent motivations." *Morris*, 237 Ill. App. 3d at 146. Furthermore, "we note that there is no need to object to a sentencing error in order to preserve the error for review." *People v. Allen*, 268 Ill. App. 3d 947, 951 (1994).

The relevant part of the sentencing order states:

> "4. that the Class X offenses of Armed Robbery *** and the two (2) separate offenses of Attempt Murder *** were committed by the defendant as part of a single course of conduct during which there was no substantial change in the nature of the defendant's criminal objective *AND* that the defendant inflicted severe Bodily injury upon both victims." (Emphasis in original.)

Defendant argues that at the sentencing hearing the trial court did not make appropriate determinations regarding course of conduct, motivation, and bodily injury. However, the plain language of the sentencing order demonstrates otherwise. Furthermore, the trial court made an explicit finding that defendant inflicted severe bodily injury upon both victims. Therefore, the consecutive sentencing provision was mandatory.

We find defendant's reliance on the case of *People v. Bole*, 155 Ill. 2d 188 (1993), to be misplaced. In that case, the defendant's convictions stemmed from three counts of criminal sexual assault which occurred on three sep-

arate dates. The *Bole* court found the defendant's acts were committed in separate courses of conduct thereby precluding application of section 5-8-4(a). *Bole*, 155 Ill. 2d at 199. After a careful review of the entire record and the case law, we determine that the trial court did not err when it determined defendant's sentence for armed robbery must be served consecutively to the similarly consecutive sentences for attempted murder.

Furthermore, Defendant argues that under *People v. Ivey*, 267 Ill. App. 3d 310 (1994), his consecutive sentences were improper. However, we find *Ivey* to be distinguishable from the case at bar. In *Ivey* at page 312, the court held that were the defendant has been convicted of multiple offenses committed as part of a single course of conduct, including one which triggers the mandatory consecutive sentencing provision of section 5-8-4, the sentence for every offense need not be consecutive to *every other* offense arising from that course of conduct, even where only one is a "triggering" offense. In other words, section 5-8-4 (a) mandates consecutive sentencing only for the triggering offense. In this case, each offense constitutes a triggering offense. Therefore, under the plain language of the statute, the trial court had the authority to impose consecutive sentences for each offense.

Last, defendant argues that the trial court abused its discretion in sentencing him to consecutive extended term sentences totaling 90 years' imprisonment where the court failed to consider mitigating factors. Specifically, defendant argues that the trial court failed to consider that (1) he completed his high school education while in jail despite a learning disability; (2) he expressed remorse; and (3) he had been an exemplary prisoner while in the penitentiary.

"[O]ur decisions have firmly established that the imposition of a sentence is a matter of judicial discretion and that, absent an abuse of this discretion, the sentence of the trial court may not be altered upon review." *People v. Perruquet,* 68 Ill. 2d 149, 153 (1977).

> "This court will not disturb a sentence imposed by the trial court unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose. [Citation.] In this State, the spirit and purpose of the law are upheld when a sentence reflects the seriousness of the offense and gives adequate consideration to the rehabilitative potential of the defendant." *People v. Heflin,* 71 Ill. 2d 525, 545 (1978).

Furthermore,

> "[w]hen a reviewing court is requested to exercise its power to reduce a sentence, that power must be exercised cautiously and the court will not engage in mere judicial clemency. [Citation.] A reviewing court cannot substitute its judgment for that of the trial court simply because it would have balanced the factors differently." *People v. Green,* 233 Ill. App. 3d 298, 303 (1992).

This is true because,

> "[a] trial judge is in a far better position than an appellate court to fashion an appropriate sentence, because such judge can make a reasoned judgment based upon firsthand consideration of such factors as 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age' [citations]; whereas the appellate court has to rely entirely on the record [citation]." *People v. Streit,* 142 Ill. 2d 13, 19 (1991), quoting *Perruquet,* 68 Ill. 2d at 154.

Finally, a trial judge's sentencing decision is presumed to be based on proper legal reasoning "unless there is some statement in the record, aside from the sentence imposed, which would tend to indicate otherwise." *People v. Goodman,* 116 Ill. App. 3d 125, 128 (1983).

Defendant's argument relies almost entirely on the following statement made by the trial court. "That the only possible mitigating factor as to the defendant Hampton who was only 19 years of age at the time of the present crimes is that he has no history of a prior delinquency or criminal activity." A careful review of the record indicates that the trial court considered defendant's potential for rehabilitation before making this statement.

Furthermore, the plain language of the sentencing order demonstrates that the trial court properly considered mitigating factors in sentencing defendant. The relevant portion of the sentencing order states:

> "2. That the Court has considered all the relevant factors in aggravation, *** as well as having considered the relevant factors in mitigation, including but not limited to the defendant's age (19 at the time of these offenses) and the lack of a history of prior delinquency or criminal activity."

The order states that the mitigating factors are not limited to the ones enumerated in the order. Therefore, it cannot be stated that the trial court failed to consider other mitigating factors. Defendant's argument must fail.

In terms of the actual sentence imposed, it must be remembered that it is not this court's function to reweigh the relevant sentencing factors. Nevertheless based on the facts of the present case, we determine that it was

eminently reasonable for the trial court to sentence defendant to consecutive extended term sentences totaling 90 years' imprisonment. The mitigating factors defendant discusses all have one thing in common: They all occurred after the commission of a particularly brutal and heinous crime. It is not out of the realm of possibility that the sole impetus for defendant's "exemplary" behavior was the desire to receive a favorable sentence. In light of the great deference bestowed upon a trial court's sentencing decision, we conclude that the trial court did not abuse its discretion in sentencing defendant.

For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

HUTCHINSON, J., with DOYLE and THOMAS, JJ., concurring.

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 2, 1996

Mr. David E. Camic
Camic, Johnson, Wilson & Bloom, P.C.
546 West Galena Boulevard
Aurora, IL 60506

No. 81494 – People State of Illinois, respondent, v. Joseph W. Hampton, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1996.

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Marvin Ira Bloom
Attorney at Law
53 West Jackson Boulevard
Suite 1430
Chicago, Illinois 60604

Case Number: 1:97-cv-07885

Title: Hampton v. Godinez

Assigned Judge: Honorable James B. Moran

MINUTE ORDER of 8/5/98 by Hon. James B. Moran: Enter memorandum and order. We defer ruling on petitioner's writ of habeas corpus until such time as the parties present to the court the requested arguments and information, which we ask them to do by 09/01/98. Mailed notice

This docket entry was made by the Clerk on August 6, 1998.

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system

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[Docketed August 6, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. JOSEPH W. HAMPTON,	)	
Petitioner,	)	
vs.	)	No. 97 C 7885
GEORGE E. DETELLA, Warden, Stateville Correctional Center, and JAMES RYAN, Attorney General of the State of Illinois,	)	
Respondents.	)	

MEMORANDUM AND ORDER

Joseph Hampton (Hampton), a prisoner at Stateville Correctional Center, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, we defer ruling on the petition.

BACKGROUND

Hampton, along with a co-defendant, Jayme P. Sebers, was charged in the Circuit Court of Kendall County, Illinois, with multiple counts of attempted murder, armed robbery, and aggravated battery. The two waived their rights to a jury trial and on August 20, 1991, pleaded guilty to the charges and were sentenced. They both filed

motions to withdraw their guilty pleas and to vacate the convictions, which were denied. In separate appeals, the Illinois Appellate Court reversed the orders denying the motions to withdraw the guilty pleas and ordered that the defendants be allowed to enter new pleas. *See People v. Hampton*, 620 N.E.2d 3 (Ill.App.2d Dist. 1993).

On remand, both defendants pled not guilty and requested that the court allow them to reinstate their jury demands, which the court denied. The case proceeded to bench trial and both were found guilty. Hampton was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count, for a total of 90 years imprisonment, with a concurrent term of 10 years for aggravated battery.

Hampton appealed, raising the following issues: (1) he was denied his right to defend against the charges when the trial judge declared him guilty without affording him an opportunity to present closing argument; (2) the court erred when it denied him the opportunity to impeach a state witness and admitted irrelevant and incompetent evidence; (3) the court erred in determining that his sentence for armed robbery must be served consecutive to his sentences for attempted murder; and (4) the court abused its discretion in sentencing him to consecutive extended-term sentences totaling 90 years imprisonment. On April 1, 1996, the Illinois Appellate Court denied Hampton's appeal. Hampton filed a timely leave for appeal to the Illinois Supreme Court, which was denied on October 2, 1996. He then filed a petition for *writ of certiorari* to the United States Supreme Court, which was denied on March 31, 1997.

Co-defendant Sebers filed a separate appeal and on March 3, 1997, the appellate court reversed the trial court's denial of Sebers' request for a jury trial, and remanded the case to the pleading stage. On June 4, 1997, the Illinois Supreme Court denied the state's petition for leave to appeal the decision with regard to Sebers.

On November 12, 1997, Hampton filed the instant petition for writ of habeas corpus, raising two claims: (1) he was denied due process of law and his Sixth Amendment right to counsel when the state court declared him guilty without allowing him to present a closing argument; and (2) he was denied his equal protection rights when the appellate court reversed Sebers' conviction on the basis that the trial court had erred in denying his request for a jury trial.

DISCUSSION

On the merits, Hampton's petition is governed by the recent amendments to 28 U.S.C. § 2254. Section 2254(d) governs the consideration of any claim adjudicated by a state court on its merits. *Lindh v. Murphy*, 96 F.3d 856, 868-71 (7th Cir. 1996), *rev'd on other grounds,* 117 S.Ct. 2059 (1997). Under § 2254(d)(1), habeas relief may be awarded only if the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," as determined by the United States Supreme Court. Under subsection (d)(2), habeas relief is only possible if the state court adjudication "resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented" in the state court. The "unreasonable application" exception of § 2254(d)(1) applies to mixed question of law and fact, and thus where the state court offers "a responsible, thoughtful answer" after "a full opportunity to litigate" the question, a federal court on habeas review must accept that answer as "adequate to support the judgment." *Id.* at 871.

However, "[b]efore a federal court may review the merits of a claim raised by a state prisoner in a habeas petition, the petitioner must fulfill the procedural requirements set by state law for seeking judicial review in the state courts." *Lemons v. O'Sullivan*, 54 F.3d 357, 360 (7th Cir. 1995), *cert. denied,* 516 U.S. 993 (1995). Forfeiture of a claim under § 2254 "is a question of a state's internal law: failure to present a claim at the time, and in the way, required by the state is an independent state ground of decision, barring review in federal court." *Hogan v. McBride*, 74 F.3d 144, 146 (7th Cir. 1991). Procedural default may occur in one of two ways. First, the petitioner may fail to raise fairly and properly an issue on direct appeal or post-conviction review. *See Momient-El v. DeTella*, 118 F.3d 535, 538-39 (7th Cir. 1997), *cert. denied,* ___ U.S. ___, 118 S.Ct. 448 (1997). Alternatively, procedural default occurs when the state court clearly relies on a state procedural bar as an independent basis for it denial of relief. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1197 (7th Cir. 1998). A petitioner may raise a procedurally defaulted claim in a habeas proceeding only by showing good cause for the default and actual prejudice stemming therefrom. *United States v. Frady*, 456 U.S. 152 (1982).

Hampton's first claim is that the state court's refusal to afford him the right to present closing argument was contrary to, or an unreasonable application of, his clearly established Sixth Amendment right to counsel. *See Herring v. New York*, 422 U.S. 853 (1975). Hampton's lawyer did not object at the time the trial court began to make findings nor did he request to make closing arguments. On appeal, the court found that Hampton had waived his right to present closing argument by his failure to object. *People v. Hampton*, No. 2-95-0123, at 3 (Ill.App.2d Dist. 1996), (citing *People v. Coleman*, 571 N.E.2d 1035, 1039 (Ill.App.1st Dist. 1991)). Because the appellate court clearly relied on the failure to object to deny Hampton's claim, the state argues that he is procedurally barred from raising that claim on habeas.

Normally, a defendant's failure to object at trial constitutes a waiver of the underlying issue that acts as a procedural bar on habeas review so long as the state "regularly or consistently applies[s]" a contemporaneous objection rule to bar consideration of errors on direct appeal. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). However, we are not dealing here with the straightforward application of the type of state procedural rule that would support a finding of default. Instead, Hampton asks this court to find that the state court's finding of waiver in itself constituted a violation of federal law. It is well established that the issue of whether a defendant knowingly waives his right to present a closing statement by failing to object is an issue of constitutional magnitude. *See United States v. Spears*, 671 F.2d 991 (7th Cir. 1981). Accordingly, we find that Hampton has not procedurally defaulted his Sixth Amendment claim that he was denied the right to summation.

We therefore turn to an evaluation of Hampton's Sixth Amendment claim on the merits. The United States Supreme Court in *Herring*, 422 U.S. at 856-65, held that it is *per se* reversible error in any criminal trial, whether to a jury or to a judge, for the court to deny the defendant the opportunity to present a closing argument. The court reasoned that the opportunity to make closing argument is an integral part of the Sixth Amendment right to counsel. However, the *Herring* court endorsed the proposition that the right to present a summation may be waived by quoting with approval the statement of the Maryland Court of Appeals in a previous case:

> The Constitutional Right of a defendant to be heard through counsel necessarily includes the right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument. . . .

Id. at 860 (*quoting Yopps v. State*, 178 A.2d 879, 881 (Md. 1962). Generally, before a waiver of the right to present closing argument will be found, the record must demonstrate its "intentional relinquishment or abandonment." *Spears*, 671 F.2d at 993 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Although acknowledging the right to summation could be theoretically waived, the *Herring* court did not discuss the factors sufficient to show waiver, and this issue has continued to vex courts that have dealt with this issue. While it is clear that a defendant may waive his right to closing argument where his lawyer explicitly declines the court's offer to make such argument. *See, e.g., Common-*

wealth v. McCray, 243 A.2d 453 (Pa.Super.Ct. 1968), where the issue of summation is not raised at the trial level, courts have split over whether to infer a waiver of the right of summation on the basis of defense counsel's silence. *See Spears*, 671 F.2d at 993-994 (discussing conflicting state court cases regarding whether defendant can waive right to summation by mere silence). Thus, some courts have inferred a waiver from defense counsel's failure to object. *See United States v. Stenzel*, 49 F.3d 658, 662 (10th Cir. 1995); *People v. Riley*, 579 N.E. 2d 1008 (Ill.App.1st Dist. 1991); *State v. Rojewski*, 272 N.W.2d 920 (Neb. 1979); *Covington v. State*, 386 A.2d 336 (Md. 1978); *Lee v. State*, 369 N.E.2d 1083 (Ind.Ct.App. 1977) (Staton, P.J., concurring); *State v. Hale*, 472 S.W. 2d 365 (Mo. 1971), while others have been more reluctant, *see United States v. King*, 650 F.2d 534 (4th Cir. 1981).

In its only pronouncement on this issue, the Seventh Circuit, *in dicta,* rejected the idea that a defendant could waive the right to summation where he did not have a meaningful opportunity to object. *Spears*, 671 F.2d at 994. On the merits, the court found that the defendant had waived his right since he remained silent despite that fact that he had three weeks before the verdict was announced to request summation. *Id.* at 995. However, the court went on to state that "where the announcement of the verdict comes on the heels of the close of evidence, it seems unrealistic to suggest that the failure to request constitutes a waiver. Clearly, under such circumstances, it could not be said that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 994 (citing *Johnson*, 304 U.S. at 464).

The Fifth Circuit in *United States v. Martinez*, 974 F.2d 589 (1992), agreed. In that case, the court concluded that "the critical factor in deciding whether the silence of counsel constitutes a waiver is whether there was a meaningful opportunity for counsel to request argument or to object, considering all the attendant circumstances." *Id.* at 591-92. The court went on to say that when "the court announces that it will not hear oral argument a waiver can only be inferred from counsel's silence if, after the close of the evidence, counsel has had time to contemplate making the argument, has an opportunity to object and does not, and makes no post-trial effort to assert the right at a time when the error might be cured." *Id.* at 592. The court held that the defendant had made a valid waiver under the facts of that case, where the court did not announce its ruling immediately after the close of evidence, instead calling for a recess during which time defense counsel had an opportunity to collect his thoughts. *Id.*

We tend to agree with *Spears* and *Martinez* that a defendant cannot waive his right to present closing argument without a meaningful opportunity to request argument or object. The Illinois Court of Appeals found that since *Herring* permitted waiver of the right to present closing statement, Hampton did not suffer any constitutional violation in this case where defense counsel did not seek to make closing argument, or object when the judge began to make his findings. *Hampton*, No. 2-95-0123, at 3. However, *Spears* specifically states that where the trial court makes its findings immediately following the close of evidence, the fact that defense counsel does not request summation or object does not constitute a valid

waiver. 671 F.2d at 994. In light of this, it is arguable that if Hampton was not given time to object before the trial court made its findings, the state appellate court's decision to the contrary would have involved an unreasonable application of *Herring*, entitling Hampton to habeas relief under § 2254(d)(1).

However, even if Hampton could succeed in showing that he did not have time to request summation or object before the court made its findings of fact, we are troubled by the idea of granting him habeas relief on this ground. After all, habeas relief is limited to cases in which the petitioner can show that he is in custody on the basis of a state court decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Here, by *Herring*, the Supreme Court has clearly established that a criminal defendant is entitled to present closing argument. However, we are not sure if the precise issue we are dealing with here—that is, whether a criminal defendant has *waived* his right to present closing argument—is also clearly established Supreme Court law. While we subscribe to the view that a district court evaluating a habeas petition may look to lower federal court interpretations of clearly established Supreme Court rules, we are not sure in this case if the issue of waiver is merely a "gloss" on the right to present closing argument, or a separate issue altogether. In the latter case, even if Hampton did not waive his right, it would seem that he would not be entitled to habeas relief since it could not be said that he was in custody in violation of clearly established Supreme Court law. Accordingly, we request that

the parties submit arguments regarding whether the issue of waiver of the right to summation is clearly established Supreme Court law.

Each party proceeds to make arguments on the assumption that the waiver issue is dispositive. We will evaluate these arguments with the above caveat in mind. In support of his position, Hampton asserts (without pointing to any specific portions of the record) that the trial judge "immediately declared [him] guilty after ruling on a motion without affording counsel the opportunity . . . to request or to present closing argument" (Pet. Resp. at 2). The state apparently concedes this fact, as it makes no attempt to refute it. Instead, the state takes a different route and argues (almost as an afterthought) in its surreply that "there is strong reason to believe that Petitioner's waiver of closing argument was more than counsel merely standing mute rather than interrupting the judge. . ." (Surreply at 2-3). The state goes on to provide what is apparently a quote from the trial court's denial of Hampton's post-trial motion for a new trial. In it the court states as follows:

> As to Paragraph 5, notwithstanding defense counsel's failure to ask for an opening statement, or defense counsel's failure to request a closing statement or objecting to the Court at any time and further notwithstanding defense counsel's statements to the Court before attorney Frank Brewe and the Court Administrative Assistant, that they had no intention to ever make closing arguments nor were they even going to raise that as an issue in this case. . .

(Surreply at 3) (emphasis added in surreply). On the basis of this citation, the state concludes that "an off-the-

record discussion had occurred in which counsel had explicitly waived the right to present closing argument" (Surreply at 3).

Of course, if there was record evidence that Hampton's counsel explicitly waived his right to present a closing statement, that would dispose of the case. *See Spears* at 993. However, there is insufficient information before this court at this time to make such a finding. The state has not even attached in its appendix a copy of the record verifying that the trial court did in fact make the statement regarding waiver that the state describes in its surreply. Instead, it provides an apparent quote from the record taken from an earlier state court brief. At this point, we are reluctant to reject Hampton's Sixth Amendment claim on the state's currently unsubstantiated evidence of explicit waiver. We would be inclined to find waiver should it be verified that the court made the above statement, since it would provide strong evidence of a direct and specific discussion between the trial court judge and defense counsel regarding the issue of waiver. This would be especially true if Hampton could make no showing to the contrary. Accordingly, we defer ruling on the merits of Hampton's Sixth Amendment claim and order both parties to submit a copy of the record, indicating those portions that support their arguments regarding waiver.

Hampton's second claim is that he was denied equal protection of the law when his co-defendant was granted a new trial on the basis that the trial court erred in denying his request for a jury. The state argues that Hampton has procedurally defaulted his equal protection claim since he failed to raise the issue at the state court

level. *See Momient-El*, 118 F.3d at 538-39. Hampton does not deny that he failed to raise either the equal protection claim or the underlying jury waiver issue to the state court. Instead, he argues that he should be excused from his procedural default since he was unable to present the jury waiver claim in state court because it was contrary to existing law as expressed in *People v. Shuman*, 590 N.E.2d 99 (Ill.App.3d Dist. 1992), *appeal denied*, 602 N.E.2d 471 (Ill. 1992).[1] Additionally, Hampton contends that it was only after the Illinois Court of Appeals ruled in *People v. Sebers*, No. 2-95-0128 (Ill. App.2d Dist. 1997), contrary to *Shuman*, that co-defendant Sebers was entitled to a new trial that Hampton's equal protection claim arose. This, he argues, constitutes cause excusing the default.

"[A] showing that the factual or legal basis of a claim was not reasonably available to counsel" may be cause for bringing an otherwise procedurally defaulted habeas corpus petition. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In *Reed v. Ross*, 468 U.S. 1, 16 (1984), the Supreme Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to

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[1] Hampton also asserts that *People v. Hall*, 499 N.E.2d 1335 (Ill. 1986) prevented him from being able to make his jury waiver claim on appeal. However, that case, which dealt with the totally distinct question of whether a defendant had knowingly and intelligently waived his right to a jury at sentencing. *Id.* at 1349. That case did not deal with the issue Hampton is concerned with here, namely, the effect of a remand order on a defendant's previous decision to waive his right to a jury. In fact, the Hall court affirmed the lower court's decision and did not issue a remand order. *Id.* at 1354.

counsel, a defendant has cause for his failure to raise the claim." *See Salberg*, 969 F.2d 379, 382 (7th Cir. 1992) (interpreting a constitutional claim as not "reasonably available" if the decision establishing that claim "(1) expressly overruled existing Supreme Court precedent, (2) overturned a long-standing and widespread practice to which a "near unanimous" body of lower court authority had adhered or (3) disapproves a practice that the Supreme Court had arguably sanctioned in the past," citing *Reed*, 468 U.S. at 17). However, in light of *Teague v. Lane*, 489 U.S. 288 (1989), the validity of *Reed* is questionable. *See Prihoda v. McCaughtry*, 910 F.2d 1379, 1386 (7th Cir. 1990). *But see Gacy v. Welborn*, 994 F.2d 305, 311 (7th Cir.) (en banc) ("Any claim sufficiently novel that it was unavailable during the state proceedings must be a 'new rule' under *Teague*."), *cert. denied*, 114 S. Ct. 269 (1993).

However, even assuming that *Reed* survives *Teague*, Hampton is not able to show cause under that standard here. The new rule that the *Sebers* court allegedly established is a state law rule, not a constitutional one. Specifically, Hampton argues that under *Shuman*, the law was that a remand placed the defendant in the same position that he would have been had the trial court error not occurred. Thus, where a defendant did not voluntarily plead guilty, a remand put him back to the pleading stage. *Id.* at 101. The alleged change in the law created by *Sebers* is that now a remand places a defendant back to a position prior to the error. The appellate court remanded *Sebers*—where the issue was the validity of the defendant's plea back to the jury waiver stage, which was, Hampton contends, before the pleading stage. The *Sebers* court clearly did not—indeed, it could not—

establish a new constitutional rule of the type that would have excused Hampton's failure to raise the issue on state court appeal. Instead, the issue is definitely one of state law—defining what is the procedural effect of an appellate court's remand—that simply cannot provide the basis for a finding of cause. *See Murray*, 477 U.S. at 488.[2]

Hampton attempts to bootstrap the state law issue into one of the constitutional import by arguing that the *Sebers* court's "intentional, arbitrary and capricious interpretation of state law" constituted an equal protection violation. He argues that he should be excused of any procedural default because he could not have brought his equal protection claim until after the *Sebers* court made its unconstitutional decision. He then asks this court to grant his habeas petition on the merits, since the *Sebers* court created an arbitrary classification between similarly situated persons which violates the equal protection clause.

It is true that an equal protection violation can occur when different legal standards are arbitrarily applied to similarly situated defendants. *See Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1386 (7th Cir. 1994) (citing *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)), *cert.*

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[2] Of course, Hampton's default could still be excused if he could show that it would otherwise constitute a fundamental miscarriage of justice. A fundamental miscarriage of justice is narrowly construed and is equivalent to actual, as opposed to legal, innocence. *See Saywer v. Whitley*, 505 U.S. 333, 339 (1992). However, Hampton does not claim, and we do not find, that his default should be excused because he is "actually innocent" of the crimes for which he was convicted.

denied, 514 U.S. 1037 (1995). However, even if we assume that Hampton could get around the procedural bar (which, as discussed above, we think he cannot), we think his equal protection argument lacks merit for several reasons.

First, and most importantly, Hampton's equal protection claim does not fit into the narrow categories for relief prescribed by § 2254(d). Under that provision, he must show that he is in custody "pursuant to the judgment of a State court" that "was contrary to, or involved an unreasonable interpretation of, clearly established Federal law." § 2254(d)(1). Instead, Hampton attempts to argue that the Illinois Appellate Court's decision in *Sebers*, a case to which he was not a party, violated his equal protection rights. Hampton cannot obtain such relief on habeas review by attacking the decision in a case to which he was not a party, since he cannot say he is in custody pursuant to that state court's judgement.[3]

We note that Hampton's argument is truly curious in this regard. Hampton has asked this court to find that he was prevented from raising his claim on appeal (thus excusing his procedural default) because *Shuman* correctly stated that he was not entitled to a remand that would have allowed him to reinstate a jury demand. He then asks that we grant habeas because the decision in *Sebers* violated his equal protection right by erroneously interpreting *Shuman*. He apparently makes this request precisely because he wants to benefit from the decision in

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[3] A petitioner can bring a habeas petition asserting claims that were not made during the state court proceedings when certain conditions exist which are not present here. § 2254(e)(2).

Sebers—the very one that the has argued all along was incorrectly decided. Of course, Hampton has to make this contradictory argument in order to both try to avoid procedural default and to prevail on the merits. However, in so doing, he crafts an equal protection argument that is not eligible for habeas relief since it attacks a state court decision to which he was not a party.

Moreover, we think the substance of Hampton's equal protection claim is without merit. This is because we cannot say that the *Sebers* court's interpretation of *Shuman* was arbitrary or capricious. In *Shuman*, the appellate court remanded the case where the defendant had not made a voluntary guilty plea. *Id.* at 101. The court stated that remanding the case was the better course "because it places the defendant in the position he would have been in if the errors had not occurred." In *Sebers*, the court found that Shuman did not set forth any definitive statement as to where cases should be returned on remand, *Sebers*, No. 2-95-0128, at 6, and that the overriding principle was that the trial court follow the appellate court's mandate, which, in that case, dictated that the defendant be allowed to reenter a jury demand or waiver. *Id.* at 5. We cannot say that the *Sebers* court's interpretation of the remand rule constituted an arbitrary or capricious interpretation of the general standard in *Shuman*.

At best, the *Sebers* court erred in applying *Shuman*. However, it is well established that errors of state law are not a basis for granting federal habeas corpus relief. *Williams v. Chrans*, 945 F.2d 926, 956 (7th Cir. 1991), *cert. denied,* 505 U.S. 1208 (1991). An allegedly incorrect application of state law does not become a basis for

habeas corpus relief simply by recharacterizing it as an equal protection violation because some defendants have different law applied to them. *Bowser v. Boggs*, 20 F.3d 1060, 1065-66 (10th Cir. 1994), *cert. denied*, 513 U.S. 926 (1994).

Moreover, as the state correctly points out, even if *Sebers* was an arbitrary application of state law, there can be no equal protection violation here because Hampton, who did not appeal his jury waiver claim, was not similarly situated to *Sebers*. The simple fact is that Hampton's lawyers failed to raise the jury waiver issue on appeal. This constitutes a fundamental difference between Hampton and Sebers. Hampton attempts to argue that he was similarly situated to Sebers in that they both pled guilty, had their guilty pleas vacated, were retried and found guilty. However, it was only before Sebers took his appeal that the two were similarly situated. It was after Sebers appealed, and thus placed himself in a different situation than Hampton, that the state law regarding remand was (arguably) applied differentially. Based on this, we cannot find that Hampton was similarly situated to Sebers.

In addition, contrary to Hampton's position, he was not prevented by the state from appealing the jury waiver issue; rather, he chose not to do so on the basis of his interpretation of the *Shuman* court's general statements regarding remand. That Sebers was treated differently resulted from his decision to pursue appeal based on a different reading of *Shuman*. Hampton cannot now seek to hold the state responsible for his attorney's reading of a rather open-ended statement in an appellate court

opinion and his subsequent decision to forego appeal on that issue.

Of course, what Hampton has wanted to argue all along is that the state trial court erred in not allowing him to reinstate a jury demand when his case was initially remanded. He has attempted to dress this claim up as an equal protection claim because his attorneys failed to raise the issue on appeal, while Sebers did and was successful. However, Hampton is not entitled to habeas relief on the underlying jury waiver claim since the state court's refusal of his request to reinstate his jury demand was not contrary to, or an unreasonable application of, any clearly established Supreme Court law. Accordingly, we reject Hampton's equal protection claim, and the underlying jury waiver claim.

CONCLUSION

For the foregoing reasons, we defer ruling on petitioner's writ of habeas corpus until such time as the parties present to this court the requested arguments and information, which we ask them to do by September 1, 1998.

/s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

Aug. 5, 1998

[Docketed September 22, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. JOSEPH W. HAMPTON,	)	
Petitioner,	)	
vs.	)	No. 97 C 7885
GEORGE E. DETELLA, Warden, Stateville Correctional Center, and JAMES RYAN, Attorney General of the State of Illinois,	)	
Defendants,	)	

MEMORANDUM AND ORDER

On August 5, 1998, we ruled on one of petitioner's habeas claims but deferred ruling on his petition until we had been further informed about a legal issue and a factual issue. That information has been provided. The legal issue might well be definitive. But we need not decide that matter. The trial record, pp. 1203-1204, does reflect a factual determination by the state court: that defense counsel expressly represented that "they [sic] had no intention to ever make closing arguments . . . ." It is unclear whether the representation came before or after judgment (probably after), but it is clear that counsel for defendant confirmed his waiver of argument and was not deprived of a right he would have otherwise

exercised. Accordingly, the petition for a writ of habeas corpus is denied and the petition is dismissed.

/s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

Sept. 21, 1998.

[Docketed September 22, 1998]

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

JUDGMENT IN A CIVIL CASE

U.S.A. ex rel: Joseph W. Hampton

v. Case Number: 97 C 7885

George E. Detella etc.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the petition for a writ of habeas corpus is denied and the petition is dismissed.

Michael W. Dobbins, Clerk of Court

/s/ Willie A. Haynes
Willie A. Haynes, Deputy Clerk

Date: 9/21/1998